IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No.93 of 2005

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

==========

COMMISSIONER OF INCOME-TAX - Appellant(s)
Versus
M/S.SAURASHTRA SHIP BREAKING INDUSTRIES - Opponent(s)

==========

Appearance :
MR TANVISH U BHATT for Appellant(s) : 1,
SERVED BY AFFIX.(N) for Opponent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 07/02/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. Heard Mr. Tanvish U. Bhatt, learned Standing Counsel for the appellant. Despite service there is no appearance on behalf of the respondent. **ADMIT**.

2. The following substantial question of law arises for determination:

> "Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law in granting deduction of shortage incurred in the process of breaking up of ships pertaining to earlier years against income of the year under consideration ?"

3. In light of the fact that the issue involved lies in a very narrow compass, the appeal is taken up for final hearing and disposal today.

4. The Assessment Year is 1991-92 and the relevant accounting period is year ended on 31st March, 1991.

5. As can be seen from the impugned order of the Tribunal dated 24th February, 2004 the Tribunal has accepted the case of the assessee that the shortage claimed during this year was not the actual shortage of the year, but it was cumulative shortage since 1987. While doing so, the Tribunal has recorded the following findings:

> "10. We have duly considered the rival contentions and the material on record. Principally, we agree with the contention of the CIT(A) that each year of assessment is

> independent of each other. However, there are some exceptional circumstances where the general principle cannot be or need not be applied. The facts and figures are not in dispute, particularly the fact that no shortage was claimed by the assessee during assessment years 1987-88 and 1988-89. This could not be claimed earlier, as mentioned above, on account of the fact that the assessee could not actually ascertain the shortage due to practical difficulties of weighing the scrap. It is this practical difficulty arising out of the peculiar nature of activity, which needs to be appreciated. Ship breaking is a very specialized activity. It generates various types of scrap, the sorting and classification of which itself is a task by itself. If this genuine difficulty is appreciated in its true perspective, then it is also an important principle of taxation that only that income can be taxed, which has been earned by the assessee. Under the law, income, which is not earned by the assessed, cannot attract any tax. Another aspect of the matter is that it was only during the year under consideration the shortage was ascertained and hence there is nothing wrong in claiming the same this year. The only caution to be exercised is that claim put-forth by the assessee should be genuine and the claim that no shortage could be claimed in the earlier year should also be genuine. In the present case, the facts, as mentioned earlier, are not in dispute and hence we have no hesitation in deleting the addition of Rs.20,43,270/-."

6. However, when one goes to the Assessment Order for the year under consideration, it appears that no such claim was made before the Assessing Officer. The facts recorded by the Assessing Officer including the claim made and the reason advanced for rejecting the claim of shortage reads as under:

> "2. During the year, the assessee has purchased two ships, small ship of 389 MT and

> bigger ship of 4026 MT. The bigger ship of 4026 MT has not been broken and has been shown as closing stock in the profit and loss account. There was opening stock of 288.67 MT and ship broken of 389 MT. The shortage has been claimed at 42.23%. Since the bigger ship of 4026 MT has not been broken at all, it has not been taken for accounting shortage. The shortage of 42.23% is very high. The assessee was asked to explain the shortage.
>
> 3. It is stated by the representative of the assessee that during the year, assessee has purchased a ship called "SHAMMUGHAM" weighing 389 MT. The vessel was total carroised. This resulted in the shortage of 287 MT.
>
> 4. When comparison is made between the other ship breakers of Alang Yard, the shortage is from 5% to 10%. Therefore, the shortage of 42.23% is very high. I will allow shortage at 10% and keep credit of 68 MT to assessee as reasonable shortage. The balance of shortage of 219 MT is not acceptable and is being treated as material sold out of the books of accounts. The value of sale price of 1.00 MT comes at Rs.9330/-. The value of shortage of 219 MT comes to Rs.20,43,270/-. This is added to the total income as sales made out of the books of accounts. "

7. The assessee carried the matter in appeal before the Commissioner (Appeals) who confirmed the assessment order vide order dated 16th January, 1995. As can be seen from the order of the Commissioner (Appeals) the assessee had been maintaining accounts and was in possession of quantitative details regarding the ships purchased, the scrap generated on breaking of those ships, closing stock as well as

sales from year to year including details of purchases of scrap from market for the immediately preceding Assessment Year viz. Financial Year 1989-90. The only claim made before the Commissioner (Appeals) was that scrap obtained from breaking of a ship is kept in open plots and there being no facilities for weighment of such bulks of scrap so estimated stock of broken scrap was taken.

8. It was never the case of the assessee that it was not in a position to work out the shortage from year to year on an estimated basis. In fact the accounts were audited and certificate from the auditors about the shortage reflected in accounts from 24th October, 1984 to the year ended on 31st March, 1991 was filed before the Commissioner (Appeals). In other words, the assessee had made an incorrect statement before the Tribunal that it was not possible to work out the actual shortage from year to year and only because of this situation no claim was made in the earlier years.

9. Therefore, the Tribunal while passing the impugned order has lost sight of the two basic facts viz. (i) it was never the case of the assessee before the lower authorities that the claim was cumulative claim of shortage for various years; and (ii) that the assessee could not work out the shortage

from year to year resulting in not making a claim every year, because, as recorded by the Commissioner (Appeals), the certificate of the auditors reflects the shortage as recorded in the accounts since 24th October, 1984. The only question that survives thereafter was as to what prevented the assessee from making the claim in each of the respective years. No explanation is forthcoming. The finding of the Tribunal that the claim could not be made because the assessee could not actually ascertain the shortage due to the practical difficulties of weighing the scrap is thus not borne out from the record. The Tribunal ought to have taken into consideration that for each of the earlier years the assessee had specifically worked out the opening stock, the sales during the year under consideration and the closing stock. Therefore, it was an incorrect statement of fact that the assessee could not work out the shortage from year to year. The Tribunal ought to have questioned the assessee as to how it arrived at the closing stock from year to year without working out the corresponding shortage during process of obtaining of scrap on breaking of a ship.

10. In these circumstances, the Tribunal was not justified in law in allowing the assessee to make a claim of shortage for earlier years in the year under consideration while working

out the income liable to tax during the year under consideration. The question stands answered accordingly.

11. The Assessing Authority is directed to permit deduction of scrap relatable to the year under consideration and disallow the balance which is relatable to the earlier years. The appeal is, accordingly, partly allowed to the aforesaid extent and stands disposed of accordingly.

Sd/-
[D.A. MEHTA, J]

Sd/-
[H.N. DEVANI, J]

***

*Bhavesh**